Supreme Court, U.S.
FILED

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No.

In the Supreme Court of the United States

WARREN L. PULLIAM, JANICE L. PULLIAM, KERRY W. PULLIAM, PAUL A. SIMS, CHAPLIN INSURANCE AGENCY, INC., W & J PULLIAM, INC., AND RONALD E. HINES

Petitioners

v.

OHIO CASUALTY INSURANCE COMPANY, BARNETT BANK OF TAMPA, N.A., AND PEOPLES STATE BANK OF CHAPLIN, KENTUCKY

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE KENTUCKY SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

EDNA JENELLE COULTER
219 MCGOWAN AVENUE
BARDSTOWN, KENTUCKY 40004
(502) 249-1744
COUNSEL FOR PETITIONERS

WESTERFIELD-BONTE CO., 619 W. KENTUCKY-P.O. BOX 3251, LOUISVILLE, KY

QUESTIONS PRESENTED

1. Was the Judgment in the instant case obtained by fraud on the court?

2. Was post judgment intervention authorized in the instant case?

3. May sanctions be awarded against a nonsigning party?

4. May a represented party be sanctioned for errors of law?

5. May orders be issued to one who is no longer before the court?

IN THE SUPREME COURT OF THE UNITED STATES
October Term 2008
No._____

Warren L. Pulliam, Janice L. Pulliam, Kerry W. Pulliam, Paul A. Sims, Chaplin Insurance Agency, Inc., W & J Pulliam, Inc., and Ronald E. Hines, Petitioners,
v.
Ohio Casualty Insurance Company, Barnett Bank of Tampa, N.A., and Peoples State Bank of Chaplin, Kentucky, Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE KENTUCKY SUPREME COURT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Warren L. Pulliam, the Petitioner, prays that a Writ of Certiorari issue to review the judgment of the Kentucky Supreme Court entered in the above-entitled case on November 19, 2008.

OPINION BELOW

The judgment of the Kentucky Supreme Court (Appendix D) was entered on November 19, 2008.

JURISDICTION

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1257(i).

PARTIES

Warren L. Pulliam Janice L. Pulliam, Kerry W. Pulliam, Paul A. Sims, Chaplin Insurance Agency, Inc., W & J Pulliam, Inc., and Ronald E. Hines, Petitioners.

Ohio Casualty Insurance Company, Barnett Bank of Tampa, N.A., and Peoples State Bank of Chaplin, Kentucky, Respondents.

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STATEMENT OF THE CASE

Procedural history.

This action arises out of a Complaint filed on February 1, 1988 by Barnett Bank of Tampa, N.A. (hereafter "Barnett Bank") against Peoples State Bank of Chaplin, Kentucky (hereafter "Peoples Bank"), action # 88-CI-00812, Jefferson Circuit Court, *Barnett Bank v. Peoples Bank* (hereafter the "Jefferson Circuit action"). That action was settled pursuant to an agreement of the parties on October 12, 1989.

Thereafter, Peoples Bank's Indemnitor, the Ohio Casualty Insurance Company (hereafter "Ohio Casualty"), filed suit in the United States District Court for the Western District of Kentucky against Warren L. Pulliam (hereafter "Pulliam"), who had been Peoples Bank's president and chief executive officer at the time the loss occurred.

The case came on for a three-day jury trial on June 30-July 2, 1992, and the jury returned a verdict against Pulliam in the amount of two hundred thousand dollars ($200,000.00).Ohio Casualty then filed a collection action in Nelson Circuit Court, action # 93-CI-00130, *Ohio Casualty v. Pulliam* (hereafter "the collection action") , seeking to recover on the judgment which it had obtained against Pulliam.

Ohio Casualty also impleaded, as parties defendant to the collection action, Janice L. Pulliam, Kerry W. Pulliam, Paul A. Sims, Chaplin Insurance Agency, Inc., and W & J Pulliam, Inc. That collection action remains pending before Nelson Circuit Court.

In response to a discovery request filed in the collection action, the Defendants obtained evidence

which showed that the Judgment rendered in action 88-CI-00812, had been obtained through fraud and misrepresentation. The documents in question were provided to Defendants on July 14, 2000, but were not properly identified until Ohio Casualty's designated representative gave deposition on April 18, 2002.

Upon discovering the fraud, the Defendants first sought to amend their answer in the Nelson Circuit Court action. Hon. Larry Raikes, Circuit Judge, advised the Defendants that they should apply to Jefferson Circuit Court for relief, in the original action. Therefore, on February 17, 2005, moved Jefferson Circuit Court to set aside its Judgment of October 31, 1988, and to permit them to intervene as third-party Defendants. By Order dated March 8, 2005, that court denied the Defendants' Motion. The Defendants timely moved the court pursuant to CR 59.05 to alter, amend or vacate that Judgment. This motion was denied by Order dated July 13, 2005. Thereafter, on July 21, 2005, Peoples Bank filed a Motion pursuant to CR 11 seeking sanctions against the defendants and their then attorney, Ronald E. Hines (hereafter "Hines").

This motion was granted by order dated December 21, 2005. Peoples Bank was granted sanctions in the amount of $16,533.00 and Barnett Bank was awarded $11,244.48. Thereafter, on January 20, 2006, the Movants filed an appeal with the Kentucky Court of Appeals. That appeal was denied by Order dated March 28, 2008.

Movants, thereafter, on June 17, 2008, filed a Motion for Discretionary Review with the Kentucky Supreme Court. That motion was denied by Order dated November 19, 2008.

Relevant facts.

In March, 1986, and for several years prior thereto, Warren L. Pulliam was the President, a

stockholder, and a director of Peoples State Bank which was located in Chaplin, a small town in Nelson County, Kentucky (hereafter "Peoples Bank"). The bank had been owned by the Pulliam family for more than forty years, and Pulliam's father and brother had previously been president of the bank. In that month two representatives of Prudential Insurance Company and Prudential-Bache Securities (hereafter collectively referred to as "Prudential"), Donald Tibbitts and Benham Mirzaian, appeared in Nelson County selling insurance and investment in securities.

Mr. Pulliam, other employees of the bank, as well as their friends and family members invested money in the securities offered by Tibbitts and Mirzaian. Pulliam also invested a portion of the bank's assets in Prudential securities. Tibbitts induced this investment by assigning to the Bank a certificate of deposit for forty thousand dollars to "guarantee" a return of at least ten per cent (10%) on the bank's investment. This "guarantee" was in clear violation of federal securities laws.

In September, Tibbitts induced Pulliam to certify checks, for which he did not have assets in his account, by asserting that he needed the money on a short-term basis, and that he would have sufficient funds to "cover" the certified checks within a few days. Tibbitts did, in fact, "cover" the checks in a timely manner, and the bank was not harmed. In late November and early December, 1986, Tibbitts induced Pulliam to certify further checks by making similar representations.

These certified checks were then used by Tibbitts to cover defaults in his account at Barnett Bank of Tampa, N.A. (hereafter "Barnett'). Barnett wire transferred funds totaling $835,000.00 to Peoples Bank, and Peoples suffered no loss. Pulliam had, in the meantime, secured as assignment of one million (1,000,000) shares of stock in Video Communications,

Inc. from the United States Mortgage and Trust Company of Lexington, Kentucky, to cover the shortfall. The value of that stock was three million dollars, and the bank was adequately collateralized. Tibbitts had also arranged for one million shares of the company's stock to be assigned to Barnett Bank, to collateralize his shortfall there.

On December 16, 1986, after the checks had been certified and before funds reimbursing them had been received from Barnett Bank, the shortfall was discovered in an audit of Peoples Bank. Pullliam's partner and C.P.A., James O. King, persuaded Pulliam to sell him his stock in the bank at a steeply discounted price and to resign from his positions in the bank. Tibbitts, Mirzaian, and Pulliam were subsequently convicted of bank fraud.

In February, 1988, Barnett Bank filed an action against Peoples Bank in Jefferson Circuit Court in Louisville, Kentucky. Barnett alleged that its loss had been $835,000.00. Neither Barnett Bank nor Peoples Bank impleaded Pulliam as a party to that action. In discovery, Peoples learned that Barnett's actual loss had been only $633,500.00, rather than the amount set out in its pleading. However, neither Peoples nor Barnett advised the Jefferson Circuit Court of this fact, nor did Barnett amend its complaint to correct the error. In fact, Barnett resisted disclosing this fact to Peoples, and after being forced by court order to disclose the actual amount of its loss, Peoples and Barnett secured no fewer than five (5) protective orders from the court to insure that no one else would become aware of this fact.

After Barnett had been forced to disclose the true amount of its loss, Barnett and Peoples immediately began negotiations for settlement of the action. Peoples also filed a proof of loss claim with Ohio Casualty Insurance Company, through whom it was bonded, and Ohio Casualty participated in the

settlement negotiations. Neither Peoples Bank nor Ohio Casualty offered to allow Pulliam to assume defense of the action. On Friday, April 14, 1989, less than a month after Barnett had been forced to reveal the actual amount of its loss, Ohio Casualty's Surety and Fidelity Claims Representative William Thomas Jones visited Pulliam at his insurance office at Chaplin, Kentucky and advised him that settlement negotiations were in progress, and asked whether Pulliam would be interested in contributing to the settlement offer.

Pulliam asked Jones what settlement terms were being proposed, and Jones declined to disclose that information to Pulliam. When Pulliam indicated that he wished to defend the action, Jones terminated the discussion, and on the following Monday prepared a "Memo to File" which noted Pulliam's desire to defend the action and suggested that a better course would be to settle the action, and then recoup the entire amount of the settlement from Pulliam.

Pulliam, through his attorney, subsequently offered to contribute to any settlement offer, and was told that Ohio Casualty and Peoples would "get back to" him. Pulliam, accordingly, waited to receive further word concerning the settlement negotiations. Ohio Casualty and Peoples, however, concluded their settlement negotiations without further contacting Pulliam, who first learned of the settlement when he received a demand letter from Ohio Casualty asking him to reimburse Ohio Casualty for the amount of the settlement. Pulliam responded that he was under no obligation to repay Ohio Casualty, since he had not agreed to the settlement terms.

Ohio Casualty then filed a collection action against Pulliam in Jefferson Circuit Court. That case came on for jury trial on June 30 - July 3, 1992. During the course of that trial, Peoples Bank's counsel, Charles F. Pritchett, Jr., appeared as a witness for

Ohio Casualty, and testified that the total amount of Barnett Bank's loss had been $834,000.00, although he necessarily knew that the correct figure was $633,500.00. Mr. Pritchett also stated that Barnett Bank had told him that the Video Communications stock which both Barnett and Peoples were holding as collateral, was "worthless," although Barnett had, in fact, provided him with documents showing that "Barnett brokerage" had estimated the stock's value at six million dollars ($6,000,000.00).

Mr. Pritchett also testified that Barnett had told him that a letter of credit executed by Prudential-Bache Securities in the amount of seven hundred thousand dollars ($700,000.00) which it had been holding as collateral "was bogus," when Pritchett well knew that Barnett had not only insisted that the certificate of deposit was genuine, but had also collected $282,500.00 based, at least in part, on the genuineness of that certificate. Mr. Pritchett also testified that he did not know whether Prudential had any right of reimbursement against Barnett when, in fact, he had in his possession a copy of the agreement between Prudential and Barnett and must necessarily have known whether or not it provided for reimbursement.

At the conclusion of the trial, the jury awarded judgment against Pulliam in the amount of two hundred thousand dollars ($200,000.00). Pulliam subsequently, on October 17, 1995, filed a motion, pursuant to Rule 60(b), F.R.C.P., asking the court to set aside that judgment. The motion was denied by order dated October 7, 1996.

Thereafter, as noted above, the Movants filed a Motion to Intervene in the Jefferson Circuit Court action for the purpose of moving that court, pursuant to CR 60.02, to set aside the agreed judgment which it had entered on October 12, 1989 in action 88-CI-00812. That court denied the Movants' Motion to Intervene,

and imposed sanctions jointly and severally upon the Movants and upon their counsel, pursuant to CR 11, in the amount of $27,777.48.

Movants timely filed a Motion to Alter, Amend or Vacate that Order pursuant to CR 59.05 and, when that Motion was denied, filed an Appeal, as noted above. Prior to the imposition of sanctions, Judge McDonald-Burkman had granted Hines leave to withdraw from representation of the Movants. Consequently, at the time when sanctions were imposed against Hines, he was no longer before the Court. He, therefore, appealed the Judgment on two grounds: (1) that an order cannot be issued to one who is no longer before the court; and (2) that he had committed no act which was violative of CR 11.

REASONS FOR GRANTING THE WRIT

1. The Judgment was obtained by fraud on the Court.

The Court should note, first of all, that the Movants are not liable to either Peoples State Bank of Barnett Bank for sanctions, since the Motions and Memoranda filed by the Movants were meritorious and did not violate the provisions of CR 11. Movants sought to intervene in the instant action for the purpose of filing a Motion pursuant to CR 60.02.

That Rule provides, in pertinent part:

> On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order or proceeding upon the following grounds:
>
> (d) fraud affecting the proceedings, other

than perjury or falsified evidence.

This ground "includes such fraud as is designated "fraud upon the court" in the latter part of FRCP 60(b)." KURT A. PHILIPPS, JR., KENTUCKY PRACTICE: RULES OF CIVIL PROCEDURE ANNOTATED, CR 60.02, comment 6 at n. 29 (5th ed. 1995), *citing, Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944).

Moreover, as the treatise Federal Practice and Procedure explains, concerning the parallel federal rule:

> There is no time limit on setting aside a judgment on this ground, nor can laches bar consideration of the matter. It does not matter whether a party bringing the fraud to the court's attention has clean hands.

CHARLES ALAN WRIGHT, ARTHUR R. MILLER AND MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2d § 2870 at nn. 15-17 (1995).

Kentucky courts formerly recognized a difference between "intrinsic fraud" or fraud on the defeated party, and "extrinsic fraud" or fraud affecting the proceedings. This distinction is no longer important, however, since "when the court finds fraud on a party in fact there is fraud affecting the proceedings." PHILIPPS, *supra*, CR 60.02 comment 6 at n. 30.1 (2004 Supp.)

Movants concede that the meaning of "fraud on the court" has sometimes been unclear. The Plaintiff's Complaint overstated the amount of Barnett's loss by some $201,500.00. Moreover, when the Defendant at length discovered this misrepresentation, it did not call this fact to the court's attention, despite the fact that

both parties' counsel, as officers of the Court, had a duty to do so pursuant to SCR 3.130-1.2(d)("a lawyer shall not assist a client in conduct that the lawyer knows is fraudulent"), SCR 3.130-3.3(a)(1)("a lawyer shall not knowingly make a false statement of material fact to a tribunal"), and SCR 3.130-3.3(a)(2)("a lawyer shall not knowingly fail to disclose a material fact to the tribunal.")

The Court should note that this misrepresentation was ultimately perpetrated, not against the opposing party (who eventually uncovered the misrepresentation), but solely against the tribunal, which was left to proceed upon information which both parties knew to be inaccurate. Some federal cases have implied that nondisclosure of material facts to a party opponent may not always constitute "fraud on the court;" *see,* WRIGHT, MILLER, AND KANE, *supra,* § 2870 at n. 32.

Whatever may be the rule in federal courts, however, the rule in Kentucky is clear. In *Terwilliger v. Terwilliger,* Ky., 64 S.W.3d 816 (2002), a divorce action which arose in Jefferson Circuit Court, the husband secured his wife's consent to, and this Court's approval of, an agreed settlement by misrepresenting the amount of his assets. 64 S.W.3d at 817. Upon discovering the true facts, Ms. Terwilliger moved to set aside the judgment thus obtained, pursuant to CR 60.02, alleging:

> that the property division that she had agreed to in the settlement was procured through fraud, misrepresentation, lack of full disclosure, and overreaching on the part of Mr. Terwilliger.

Terwilliger v. Terwilliger, 64 S.W.3d at 817.

The Court granted the motion and modified its judgment. *Id.* Mr. Terwilliger appealed that modification to the Kentucky Court of Appeals, claiming that such misrepresentation did not constitute "fraud on the court." The appellate court characterized Mr. Terwilliger's conduct as "disturbing," but found that it did not constitute "fraud on the court." *Terwilliger,* 64 S.W.3d at 817-18.

Ms. Terwilliger then appealed to the Kentucky Supreme Court, which reversed the Kentucky Court of Appeals and reinstated the judgment of the trial court. In its opinion, Kentucky's highest court stated:

> It is the finding of this Court that fraud on a party is, in fact, "fraud affecting the proceedings." As Appellant notes, by filing a settlement agreement with knowingly undervalued marital assets, Mr. Terwilliger used the proceedings as a tool to defraud his wife.

Terwilliger, 64 S.W.3d at 818.

As authority for its holding, the *Terwilliger* court cited *Burke v. Sexton,* Ky. App., 814 S.W.2d 290 (1991).In that case, the husband had procured his wife's signature to a settlement agreement, persuaded her to waive all further notice of the proceedings, and then lulled her into inaction by repeatedly representing to her that he did not intend to proceed with the divorce. *Burke v. Sexton,* 814 S.W.2d at 291.

The Court held that such conduct "may have . . . prevented [Ms. Burke] from participating in the action," and affirmed the trial court's judgment granting her relief under CR 60.02. *Id.*

The *Terwilliger* court also cited as authority *McMurry v. McMurry,* Ky. App., 957 S.W.2d 731 (1997).It noted that the trial court had denied Ms. McMurry's CR 60.02 motion:

> because Ms. McMurry failed to show that her husband had attempted to or had concealed or misrepresented any information concerning the couple's finances. Impliedly, had such evidence been produced, Ms. McMurry would have been entitled to a reopening of the settlement agreement pursuant to CR 60.02(d).

Terwilliger, 64 S.W.3d at 819.

The court then observed that Ms. Terwilliger, by contrast, "has produced evidence of fraud by her husband, and the trial court found that evidence persuasive." Consequently, the Kentucky Supreme Court held that she had been entitled to relief under CR 60.02.

Although each of the foregoing cases involved a divorce, the rule enunciated therein obviously does not apply solely to domestic relations actions, and the Movants submit that the conduct of Peoples State Bank and Barnett Bank falls squarely within the coverage of that rule.

Barnett Bank and Peoples State Bank, like Thomas Terwilliger, secured the trial Court's approval of the agreed settlement by misrepresenting the amount of money involved in that settlement. Like Thomas Terwilliger, the settling parties in this action "knowingly overvalued" that sum. Like Ray Sexton, Peoples State Bank lulled Warren L. Pulliam into

inaction, and then secured the trial Court's approval of a consent judgment without his knowledge. Warren L. Pulliam, like Carol Sexton, had no knowledge of the judgment until weeks after it had been entered, although his interests were seriously affected thereby.

Unlike Mary McMurray, Warren L. Pulliam can show that Barnett Bank and Peoples State Bank "concealed" and "misrepresented" vital information relating to this case and the full extent or his interest therein. Therefore, under the rules set out above, Warren L. Pulliam will be able to demonstrate "fraud on the court." Nor does this fraud relate only to matters which are irrelevant or immaterial. When a court enters a judgment by consent:

> It is a judicial function and an exercise of the judicial power to render judgment on consent. A judgment upon consent is a judicial act . . . In all these cases the court determines that the unchallenged facts shown of record establish a legally binding obligation; it adjudicates the plaintiff's right of recovery and the extent of it, both of which are essential elements of the judgment.

Pope v. U.S., 323 U.S. 1, 12 (1944)(citations and internal quotations omitted).

In performing this judicial function and entering a judgment by consent:

> Neither the responsibility nor the duty of the court to render a just judgment should be shifted to counsel in the case. While it is entirely proper for the court to accept stipulations of counsel which

> appear to have been made advisedly, and after due consideration, the court cannot surrender its duty to see that the judgment to be entered is a just one, nor is the court to act as a mere puppet in the matter.

City of Los Angeles v. Harper, 48 P.2d 75, 77 (Cal. App. 2d Dist. 1935); *Plaza Hollister v. County of San Benito,* 84 Cal. Rptr.2d 715, 723 (Cal. App. 6th Dist. 1999); *Auto Ass'n Inter-Ins. v. Superior Ct.,* 788 P.2d 1156, 1159 (Cal. 1990); 49 C.J.S. *Judgments* § 182 n. 34 (1997).

In determining whether the proposed agreed judgment "is a just one," the court accepts as true the uncontested facts presented to it by the consenting parties. *BancoKy Co.'s Rec'r v. Nat'l Bk. Of Ky.'s Rec'r,* 281 Ky. 784, 803 (1939).

It necessarily follows that if the stipulated facts are incorrect, the court is unable to properly determine whether the proposed consent judgment "is a just one." It also follows that any party which stipulates to facts which it knows to be incorrect, prevents the court from adequately performing this judicial function, and thus perpetrates a fraud on the court. This is especially the case when that erroneous stipulation is made by an attorney who, as an officer of the court, has a duty to safeguard its processes.

> An attorney's loyalty to the court, as an officer thereof, demands integrity and honest dealing with the court, and, when he departs from that standard, he perpetrates a "fraud upon the court" within the savings clause of the rule governing relief from judgment or order.

WRIGHT, MILLER, AND KANE, *supra*, § 2870 n. 36, *citing*, *Kupferman v. Consolidated Research and Mfg. Corp*, 459 F.2d 1072 (2d Cir. 1972).

For example, in *Toscano v. C.I.R.*, 441 F.2d 930 (9th Cir. 1971), the court held that an attorney's having stipulated to erroneous tax information constituted such "fraud on the court" as justified setting aside the judgment thus obtained. 441 F.2d at 936. Likewise, in *Bagby v. Bagby*, 10 Ky. Law Rep. 540 (Sup. 1888), the court held that a legal fraud results from the procuring of, and insisting upon the binding efficacy of, a judgment obtained by false representations. 10 Ky. Law Rep. At 541.

Applying these rules to the instant case, the parties represented to Judge Peers that they had settled the case for approximately 23.95 % of the amount claimed, or approximately twenty-four cents ($.24) on the dollar, when they had actually settled it for 31.57 % of the amount claimed, or approximately thirty-two cents ($.32) on the dollar. Otherwise stated, the settlement was 32 %, approximately one-third (1/3) more favorable to Barnett Bank than Judge Peers was led to believe. It is quite plausible that Judge Peers, whose duty it was to protect the public interest in maintaining the viability of banking institutions. would have determined that while Peoples State Bank's counsel was justified in settling the case for twenty-four (24) cents on the dollar without asserting the Bank's available defenses, a settlement which permitted Barnett Bank to recover to recover thirty-two (32) cents on the dollar was unfair to Peoples State Bank, in light of the strength of that Bank's available defenses.

Moreover, Judge Peers was not told that Peoples State Bank and its insurer, the Ohio Casualty

Insurance Company, intended to recoup the entire amount of the settlement from Warren L. Pulliam, that Pulliam had wished to assert the defenses which were available to Peoples State Bank, and that Peoples State Bank had induced him to forbear doing to by falsely representing to him that he was that he was to be included in the settlement negotiations. Intervening Defendants submit that, had Judge Peers been apprized of these facts, she would not have approved the proposed settlement.

A judgment may be set aside for fraud on the court if one demonstrates "an unconscionable plan or scheme which is designed to improperly influence the court in its decision. *England v. Doyle,* 281 F.2d 304, 309 (9th Cir. 1960); WRIGHT, MILLER AND KANE *supra,* § 2870 at n. 24. The deliberate representations to Warren L. Pulliam by Peoples State Bank and its insurer, Ohio Casualty Insurance Company, constituted such an unconscionable scheme, and entitled the Movants to relief.

2. Post judgment intervention is authorized in appropriate cases.

Intervention of right is authorized by Rule 24 of the Kentucky Rules of Civil Procedure. That Rule provides, in pertinent part:

> **CR 24.01 INTERVENTION OF RIGHT**
>
> (1) Upon timely application anyone shall be permitted to intervene in an action (a) when a statute confers an unconditional right to intervene, or (b) when the applicant claims an interest relating to the property or transaction which is the

> subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless that interest is adequately represented by existing parties.

Courts which have considered the question generally agree that four conditions must be satisfied to permit intervention as of right under Rule 24. First, the applicant must claim an interest related to the property or transaction which is the subject of the action. Second, the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect that interest. Third, there must be a showing that the applicant's interest will not be adequately represented by the existing parties. Fourth, the application for intervention must be timely . *Restor-A-Dent Dental Laboratories, Inc. v. Certified Alloy Products, Inc.*, 725 F.2d. 871, 874 (2nd Cir. 1984); *Kleissler v. United States Forest Service,* 137 F.3d 964, 969 (3d Cir. 1998); *United States v. City of Los Angeles*, 288 F.3d 391, 397 (9th Cir. 2002); *Local 1829 of United Mine Workers of America v. Island Creek Coal Co.*, 157 F.R.D. 380, 383 (N.D. WVA. 1994); *State Farm Mut. Auto. Ins. Co. v. Colley,* 871 P.2d 191 (Wyo. 1994).

Although the right to intervene must be predicated upon these factors, the crucial prerequisite seems to be whether or not the applicant may be "bound" by the judgment in the action. 4 MOORE'S FEDERAL PRACTICE, 2d ed. ¶ 24.08; *see,* Note, 63 YALE LAW JOURNAL 408. It is generally held that an applicant may be "bound within the meaning of the rule only when he may be subject to *res judicata. Stuphen Estates v. United States,* 324 U.S. 19; *Innis, Speiden & Co. v. Food Machinery Corp.*, 2 F.R.D. 261;

Owen v. Paramount Productions, 41 F. Supp. 557; *cf., Cameron v. President and Fellows of Harvard College,* 157 F.2d 993.

The rationale is that the protection afforded by intervention of right is not essential to one who will have another legal remedy available after judgment. Note, YALE LAW JOURNAL, *supra,* at 411. And, as a general rule, no person or those in privity with him is bound by an *in pesonam* judgment arising from an action in which he was neither served with process nor given an opportunity to litigate his claims or defenses. *Pennoyer v. Neff,* 95 U.S. 714 (1878); *Hansberry v. Lee,* 311 U.S. 32 (1940).

As to the fourth factor, the timeliness of an intervention, it is governed by equitable principles and determined by the facts and circumstances of each particular case. In determining whether an intervention is timely, courts consider the following factors:

> (1) the point to which the suit has progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which the intervener knew or reasonably should have known of his interest in the suit; (4) any prejudice to the original parties due to the proposed intervener's failure to intervene at an earlier date; and (5) the existence of unusual circumstances militating against or in favor of intervention.

Veloscol Chemical Corp. v. Enenco, Inc., 9 F.3d 524, 531 (6th Cir. 1993); *see,* Annotation, *Timeliness of Application for Intervention as of Right Under Rule*

24(a) of Federal Rules of Civil Procedure, 57 A.L.R. FED. 150 (1982).

It is true, of course, that "[t]here is considerable reluctance on the part of the courts to allow intervention after the action has gone to judgment and a strong showing will be required of the applicant." 7 CHARLES ALAN WRIGHT AND ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1916,at 444 (2D ed.1986). However, special circumstances can create an exception to the general rule, and courts have recognized that intervention may be timely after judgment, depending upon the facts; *see, for example, Linton v. Commissioner of Health & Environment,* 973 F.2d 1311, 1316 (6th Cir. 1992); *Grubbs v. Norris,* 870 F.2d 343, 344 (6th Cir. 1989); *Triax Co. v. TRW, Inc.,* 724 F.2d 1224, 1228 (6th Cir. 1984); *Ky. Home Mut. Life Ins. Co. v. Duling,* 190 F.2d 797, 803 (6th Cir. 1951).

The Kentucky Supreme Court has also endorsed this rule.

> While the rule does not forbid post judgment intervention, it is broadly within the discretion of the trial judge whether to allow a party to intervene at that [*i.e.*, post-judgment] stage.

Arnold v. Commonwealth of Kentucky ex rel. Chandler, Ky., 62 S.W.3d 366, 369 (2001).

Cases in which courts have allowed post judgment intervention include *United Airlines v. McDonald,* 432 U.S. 345, 366 (1973), *Yniguez v. Arizona,* 939 F.2d 727, 735 (9th Cir. 1991); *Hodgson v. United Mine Workers,* 473 F.2d 118, 129-30 (D.C. Cir. 1972); *Thurman v. Roberts,* 36 S.E.2d 51, 54 (Ga. 1945); *Warren Tel. Co. v. Miller,* 96 N.E.2d 430, 432

(Ohio App. 1949); and *M.J.M. Financial Services, Inc. v. Burgess by Dignazio,* 533 A.2d 1092 (Pa. Cmwlth. 1987).

Movants insist that they satisfied the foregoing criteria and were fully entitled to intervene for the purpose of moving to set aside the parties' agreed judgment, which was approved by Judge Peers in her Order of October 12, 1989.

As noted above, a movant's failure to seek intervention prior tot he entry of judgment may be justified by (among other things) the existence of unusual circumstances. *Ford v. City of Huntsville,* 242 F.3d 235 (5th Cir. 2001). A number of such unusual, perhaps unique, circumstances are present in the case at bar.

First, both when the instant case was filed, and at the time judgment was entered herein, the movants had no reason to suppose they had any justiciable interest in the proceedings, and therefore had no reason to seek intervention. Certainly Janice Pulliam, Paul A. Sims, Kerry W. Pulliam, the Chaplin Insurance Agency, and W & J Pulliam, Inc., had no reason to suppose the litigation would impact their interest. W & J Pulliam, Inc., in fact, had not yet come into existence, while Kerry W. Pulliam was a resident student at Eastern State University residing in Richmond, Kentucky, throughout the period in question.

There has, likewise, been no suggestion that either Janice L. Pullliam, Warren L. Pullliam's wife, or Paul A. Sims, an employee of Chaplin Insurance Agency, had any involvement in the matter prior to the entry of Judgment on October 12, 1989.

The Respondents will, perhaps, assert that Warren L. Pulliam should have realized that the litigation might impact him and sought to intervene prior to judgment. Movants respond that if either Peoples State Bank of Barnett Bank had believed that Warren L. Pulliam had a justiciable interest in the controversy, they had a duty, pursuant to CR 19.01, to implead him as a necessary and indispensable party. Having failed to do so, they implied *sub silentio* that his presence in the case was neither indispensable nor necessary.

Second, as the Affidavits of Warren L. Pulliam and John Douglas Hubbard, which were submitted as evidence in the trial court clearly show, Warren L. Pulliam was prevented from intervening in the action prior to the entry of the consent judgment by the false representations of Peoples State Bank's counsel. The Court will note that Peoples State Bank and its insurer, the Ohio Casualty Insurance Company, represented to Warren L. Pulliam, to his wife, and to his counsel, that Warren L. Pulliam would be permitted to participate in the settlement which Peoples State Bank was then negotiating with Barnett Bank.

Having thus induced Warren L. Pulliam to refrain from taking action to protect his interest, Peoples State Bank then settled the case without Warren L. Pullliam's knowledge and to his detriment. Having thus, by its own wrongful conduct, caused this non-intervention, Peoples State Bank was thereafter estopped to assert that Warren L. Pulliam should have intervened prior to judgment.

Respondents may, however, reply that even if the Movants could not reasonably have been expected to intervene prior to the entry of the consent judgment,

they ought to have moved for intervention as soon as they learned that the judgment had been entered, and that Peoples State Bank's insurer, Ohio Casualty, intended to seek reimbursement from them. Indeed, Respondents' principal burden, upon the instant Motion, appears to have been that of justifying the lengthy delay between the filing of Ohio Casualty's collection actions, and their interposition of the instant Motion.

To the assertion that their intervention should have been filed in 1993, at the latest, Respondants answer as follows:

The fact that a period has passed between the entry of judgment and a motion to intervene is not necessarily fatal to that motion. In *U.S. v. City of Chicago,* 870 F.2d 1256 (7th Cir. 1989), the Seventh Circuit permitted intervention **eight years** after the action had been filed, and **four years** after the entry of judgment therein. 870 F.2d at 1258, 1263-64.

Timeliness of a petition for leave to intervene is not limited to chronological considerations, but is to be determined from all the circumstances. *Stallworth v. Monsanto Co.*, 558 F.2d 257 (5th Cir. 1977). As reason for granting their Motion, Movants asked that the Court consider the following three unusual circumstances:

(1) Intervention is neither required nor permitted so long as it appears some other pending action, to which the proposed intervenor is a party, will adequately protect his interest. *In re Bank of New York Derivative*, 320 F.3d 291, 300 (2d Cir. 2003).

The procedural history of Ohio Casualty's collection actions is chronicled above. During the

nearly nineteen years that those collection actions have languished, the Respondents reasonably believed that those proceedings, and particularly action 93-CI-00130, Nelson Circuit Court, *Ohio Casualty Insurance Co. v. Pulliam, et al.*, would adequately protect their interests. Indeed, most or all of the evidence which the Respondents offered in support of the instant Motion to Intervene, was assembled in preparation for trial of the Nelson Circuit Court action.

At a hearing held on September 15, 2004, Judge Raikes indicated that he did not intend to allow reception of this evidence, or to permit the instant Movants, Defendants there, to defend that action by collaterally attacking this Court's Judgment of October 12, 1989. Judge Raikes has further indicated his belief that the instant action was the proper forum for presenting such evidence.

Therefore, the Movants did not seek to intervene prior to September 15, 2004 **because**, until that time, they believed the Nelson Circuit Court action provided them an adequate remedy.

(2) Intervention may be allowed when there has been fraudulent concealment which prevented the movants from learning of their rights. *Alaniz v. Tillie Lewis Foods,* 572 F.2d 657, 659 (9th Cir. 1978), and resulted in the entry of a fraudulent judgment, *Cuthill v. Ortman-Miller Machine Company,* 216 F.2d 336, 338-39 (7th Cir. 1954). The Movants had alleged, and were required to prove, that Peoples State Bank received evidence which would have afforded Peoples a defense to this action, on June 30, 1988.

Movants stated that they were not aware of the misstatements at paragraphs 28 and 29 of the Complaint in the instant action until April 17, 2002

when Ohio Casualty's agents, William Thomas Jones, Thomas Caldwell, and Hollie Sharp verified the authenticity of the documents which Ohio Casualty had produced.

Peoples State Bank and its insurer, Ohio Casualty, did not disclose the existence of this evidence to Warren L. Pulliam or to the other Movants, and vigorously **resisted all attempts** to discover this material. **The documents vital to the Movants' defense were first produced to them on July 14, 2000,** and only after Nelson Circuit Court had issued an Order compelling their production.

The Movants served notice of their intention to depose Ohio Casualty's designated representative on July 9, 1999, at the same time that they requested the production of documents. However, it was not until April 17, 2002 that Ohio Casualty's designated representative appeared and attempted to authenticate and explain the documents which Ohio Casualty had produced. This was **twenty-one (21) months** after the documents had been produced, and **nearly three years** after Ohio Casualty had been served with the notice of deposition.

Movants insist, therefore, that Peoples State Bank and Ohio Casualty concealed the necessary evidence from them until April 17, 2002, when Ohio Casualty's designated representative appeared to authenticate the documents which it had provided twenty-one months earlier and which had been in the possession of Ohio Casualty and Peoples State Bank **since 1989**.

(3) Most significantly, for purposes of the instant motion, when one of the parties has a defense which it fails or refuses to assert, a third party who will be

adversely affected by the judgment may be permitted to intervene and assert the defense.

Similarly if a corporation has a defense to an action against it and is not asserting it, a stockholder may intervene and defend on behalf of the corporation. *Price v. Gurney,* 324 U.S. 100, 105 (1945).

While this situation arises most frequently in stockholder derivative suits, its operation obviously is not limited to stockholders, but extends to all persons similarly situated, who are or may be damaged by a collusive settlement. One federal court has explained the rule as follows:

> Many reasons, such as the appearance of fraud, collusion, or bad faith on the part of the directors of the corporation, or where they stand in a dual relation, which prevents an unprejudiced exercise of judgment, or where a corporation threatens by collusion or otherwise to neglect the proper defense of a suit, have been held sufficient [to permit intervention.] Where it is alleged that the directors of a defendant corporation refuse to defend a suit to the prejudice of the stockholders, a court of equity will permit one or more stockholders to intervene and become parties defendant, so as to file an answer, not for the corporation, but on their own behalf, to protect their own interest, and that of all other stockholders who may choose to join them in the defense.

Atlantic Refining Co. v. Port Lobos Petroleum Corp., 280 F. 934, 939 (D. Del. 1922).

There can be no doubt that the agreement which the trial court approved by its Order of October 12, 1989, resulted from exactly such a collusive settlement. Ohio Casualty's Fidelity and Surety Claims Manager, William Thomas Jones, who appears to have managed the negotiations, candidly stated at trial that Ohio Casualty and Peoples Bank intended, from the very first, to hold Warren L. Pulliam fully liable for any settlement which they concluded with Barnett Bank. Such being the case, Peoples Bank and Ohio Casualty obviously had no incentive to defend the case, since they expected to be made whole, whatever amount of settlement they paid Barnett Bank. By not impleading other parties, there was no one to apportion to.

In such circumstances, Peoples Bank and Ohio Casualty had a clear duty, before settling the case, to either secure Warren L. Pulliam's agreement to the settlement terms, or else offer to let him assume defense of the action. *Tankrederiet Geifon A/S v. Hyman-Michaels Co.*, 406 F.2d 1039, 1043-44 (6th Cir. 1969). Evidently recognizing this duty, Peoples Bank and Ohio Casualty preliminarily offered to allow Warren L. Pulliam to participate in the settlement negotiations. To that end, Jones traveled from Ohio Casualty's Louisville offices to Pulliam's insurance agency on April 14, 1989, and conducted further discussions on the matter.

When Jones discovered that Pulliam did, in fact, intend on defending the action, he refused to divulge the proposed settlement terms to him, terminated the meeting, and composed an internal memorandum to the effect that including Pulliam in the settlement appeared to be inimical to their interests. Neither Ohio Casualty nor Peoples Bank made any further contact with Pulliam, although they had agreed to do so. As a result, Pulliam and his counsel awaited further word

from Peoples Bank and/or Ohio Casualty, while the latter settled the case without Pulliam's knowledge or consent. In fact, Pulliam first learned of the settlement when Ohio Casualty sent his counsel a letter informing him that the case had been settled, and demanding reimbursement in full from Pulliam.

This is, of course, exactly the kind of collusive settlement which the aforementioned equitable rule was intended to prevent. Ohio Casualty, Peoples Bank's insurer, having lulled Pulliam into inactivity and then settled the case to his detriment, now seeks to recoup the full amount of its payment to Barnett Bank from these Movants. They are, therefore, entitled to intervene in the instant action for the purpose of setting aside the collusive Judgment and seeking a new trial.

3. Sanctions may not be awarded against a nonsigning party.

As the Court will note, the Movants did not sign the Motion to Intervene. The Court below evidently failed to note that CR 11 provides that sanctions may be awarded only against attorneys or parties who have actually signed the (supposedly) offending document. Kentucky's CR 11 is identical to Rule 11, F.R.C.P., prior to the most recent amendment of that federal rule in 1993.

Federal courts construing that rule have consistently held that Rule 11, F.R.C.P., prior to the 1993 amendment, only authorized a court to sanction a represented party if he had signed the pleading or paper in question. *Lony v. E.I. DuPont de Nemours & Co.*, 935 F.2d 604, 615 n. 3 (3d Cir. 1991)(sanctions against party require signature to "form the basis for invocation of Rule 11 against it"); *Kirk Capital Corp. v.*

Bailey, 16 F.3d 1485, 1492 (8th Cir. 1994)("reversing award of sanctions against client because "Mr. Kirchenbauer did not sign the Complaint"); *Eisenberg v. University of New Mexico*, 936 F.2d 1131, 1134-35 (10th Cir. 1991); *Souran v. Travelers Ins. Co.*, 982 F.2d 1497, 1507 (11th Cir. 1993)("Rule 11 unambiguously specifies that it is the signer, not the unsigning client, who certifies, after a reasonable inquiry, that the paper is factually and legally sufficient"); *Albrecht v. Stranczek*, 136 F.R.D. 155, 156 (N.D. Ill. 1991)("Rule 11 does not by its terms contemplate sanctions unless a party or attorney has signed a pleading").

Kentucky courts do not appear to have addressed this question in any reported case. This question is, therefore, a matter of first impression in this Commonwealth. This Court should apply the standard enunciated in the foregoing federal cases, and hold that, since none of the Movants signed the (supposedly) offending Motion, they cannot be held liable for the sanctions imposed by Jefferson Circuit Court.

4. A represented party may not be sanctioned for errors of law.

It is clear that the trial court imposed the sanction on the basis of (supposed) errors of law, rather than for any alleged factual errors. Again, while Kentucky courts do not appear to have addressed the matter in any reported case, federal courts have uniformly held that a **represented party cannot be sanctioned for errors of law made by his attorney.**

As the treatise Moore's Federal Practice explains the rule: **"A party who is represented by an attorney may not be ordered to pay monetary**

sanctions for frivolous legal arguments." JAMES WILLIAM MOORE, MOORE'S FEDERAL PRACTICE § 11.23[6][c](3d ed. 2006), *citing* Rule 11(c)(2)(A), F.R.C.P. The United States District Court for the Southern District of New York has, likewise, stated:

> Although the parties themselves **are not liable** under Rule 11 **for legally frivolous claims,** they may be sanctioned for totally meritless factual allegations.

DeJesus-Keolamphu v. Village of Pelham Manor, 999 F. Supp. 556, 568 (S.D. N.Y. 1998).

Other cases so holding include *Slane v. Rio Grande Water Conservation Dist.,* 115 F.R.D. 61, 63 (D. Colo. 1987)("this court will not hold laymen responsible for fees, when it is apparent that competent counsel would have advised them that their claims are without merit"); *Harrison v. Dean Witter Reynolds, Inc.,* 132 F.R.D. 184, 193 (N.D. Ill. 1990)("there seems little value or deterrence in sanctioning a party for an attorney's failure to reasonably investigate the law"); *Taylor v. U.S.,* 151 F.R.D. 389, 397 (D. Kan. 1993)("Mrs. Taylor was entitled to rely on [her attorney's] advice and should not be sanctioned for doing so"); *Friesing v. Vandergrift,* 126 F.R.D. 527, 529 (S.D. Tex. 1989)("sanctions should be entered **against an attorney rather than a party** when a motion is unsupported by existing law, rather than unsupported by facts"); *Satterlee v. Northside Developers, Inc.,* 216 F.R.D. 330, 336 (D. Virgin Islands 2003)(client could not be sanctioned for filing legally frivolous suit since **"the assertion of legal principles and matters of law fall solely within the duty of the attorney"**); *Patterson v. Alaska Airlines, Inc.,* 756 F. Supp. 476, 480 (W.D. Wash. 1990)(only attorney sanctioned since "it was not [plaintiffs'] responsibility to determine the

limitations period"); *Powell v. Adams,* 138 F.R.D. 128, 132 (E.D. Wis.).

There has been no suggestion that any of the Movants misled their counsel concerning any of the material facts, or that any material fact was misstated in the Motion to Intervene. The Court's single objection appears to have been that the Motion to Intervene was untimely. The question of timeliness turned on whether the fraud alleged was extrinsic or intrinsic, and whether the Kentucky Supreme Court's holding in *Terwilliger v. Terwilliger,* Ky., 64 S.W.3d 816 (2002) applies retroactively. These questions are, surely, beyond the competence of laypersons who lack legal training. Any sanctions to be imposed, therefore, should fall solely on the Movants' former counsel, and not upon the Movants individually.

5. Orders may not be issued to one who is no longer before the court.

It is elementary that an order or judgment of a court binds only those who are parties to the lawsuit, or are otherwise properly before the court. As the treatise Corpus Juris Secundum explains the rule:

> [A] judgment can be taken only for or against a party to the action or proceeding. It cannot properly be rendered for or against one who is not a party thereto, or who is not subject to the jurisdiction of the court, or who has been dismissed from the suit. A judgment so given in void insofar as it concerns the person improperly included in it.
>
> The rule has also been applied to . . . a party's attorney.

49 C.J.S. *Judgments* § 29 at nn. 95-99, 17 (1997).

The treatise Freeman on Judgments, likewise, states:

> Persons who are neither parties to nor represented in an action are not within the jurisdiction of the court, and it has no authority to make an adjudication respecting their rights or obligations. Consequently it is improper to render judgment either for or against such persons, and they are neither bound by nor entitled to the benefit of such a judgment.

A.C. FREEMAN, A TREATISE OF THE LAW OF JUDGMENTS § 111 at nn. 13-15 (5th ed. 1925).

The latter treatise also makes it clear that, even though one may have been involved in the case at some point, the court cannot render a judgment affecting his interests unless he is still before the court at the time the judgment was rendered.

> The fact that a person was a party to an action in its earlier stages does not bind him by the judgment, unless he was also a party when it was rendered. If he, by permission of the court, withdraws from the action or is dismissed from it, so that he is no longer a party, then the power of the court over him terminates, and a judgment subsequently entered cannot affect his interests.

FREEMAN, *supra*, § 412 at n. 7.

Kentucky courts have repeatedly held such to be the correct rule. *Brewer v. Burch,* 306 Ky. 339, 207 S.W.2d 562 (1948); *Proctor v. Mitchell,* 302 Ky. 179, 194 S.W.2d 177 (1946); *Chapman v. Blackburn,* 295 Ky. 606, 175 S.W.2d 26 (1943); *Farmers' Nat. Bank v. Jones,* 234 Ky. 591, 28 S.W.2d 787 (1930); *Ford v. Consolidated Grocery Co.,* 229 Ky. 510, 17 S.W.2d 448 (1929).

As noted above, Peoples and Barnett moved for sanctions in July, 2005. Thereafter, and while these motions for sanctions were pending, counsel moved the court for leave to withdraw, by Motion filed September 30, 2005. Neither Peoples nor Barnett interposed any objection to counsel's Motion to Withdraw. In fact, in a letter to Mr. Hines dated September 15, 2005, Kathy P. Holder, Esq., Peoples Bank's counsel, stated:

> [M]y client does not object to your withdrawal as counsel. I have discussed this matter with Janet Jakubowicz, counsel for Barnett Bank of Tampa, N.A., and she has advised that Barnett Bank also does not object to your withdrawal.

Mr. Hines placed this letter in the record; neither Barnett nor Peoples objected to its inclusion, or advised the court that they it did not correctly set out their position. The court then granted counsel leave to withdraw, by Order dated October 10, 2005. More than two months later, on December 21, 2005, the court imposed sanctions upon both Hines and the Movants, jointly and severally.

As shown by the authorities set out above, the Order was a nullity insofar as Hines was concerned, since a court cannot issue orders or judgments against one who is no longer before it. Moreover, if Peoples and

Barnett could somehow surmount this legal hurdle, they still would not be entitled to prevail, since their failure to object to counsel's withdrawal constituted a waiver of any right they might have had to continue seeking sanctions from him. As the treatise Corpus Juris Secundum sets out the rule:

> Waiver is designed to prevent the waiving party from lulling another into the false assurance that strict compliance with [a] duty will not be required and then suing for noncompliance.

31 C.J.S. *Estoppel* § 67(b) at n. 4 (1996).

Such a waiver need not be expressed formally, but may be implied from conduct inconsistent with retention of the right sought to be asserted. *Marley Cooling Tower Co. v. Caldwell Energy & Environmental, Inc.,* 280 F. Supp.2d 651 (W.D. Ky. 2003); *Moore v. Asente,* 110 S.W.3d 336 (Ky. 2003).

In the instant case, both Peoples Bank and Barnett Bank were represented by highly competent counsel at all times pertinent hereto. Therefore both banks well knew, or should have known, the rules of law set out above. Both banks should have realized, when they stood by and allowed Hines to withdraw as counsel or record without interposing any objection thereto, that they could not afterward continue seeking sanctions from him.

Based on the foregoing rules, Hines assumed that the banks no longer sought to hold him liable for their (supposed) damages, but intended to seek recovery only from the Movants. He therefore relied to his detriment on their acquiescence in his withdrawal, and took no further action to oppose the Motions for

Sanctions. It was not until the trial court issued its Order of December 21, 2005, imposing sanctions jointly and severally upon both Hines and the Movants, that he learned the banks were still seeking to sanction him, despite the clearly established rules set out above.

Hines, therefore, reiterates, that the trial court erroneously imposed sanctions upon him after he had already been granted leave to withdraw from the case. The banks' remedy, if any, must be sought from the Movants alone.

CONCLUSION

As shown above, the judgment of the court below was clearly erroneous and must be reversed. This Court, therefore, should grant certiorari to the Kentucky Supreme Court and, upon hearing, remand the action to the trial court with directions that the action be reinstated on the court's docket and that the parties proceed expeditiously to trial. Petitioner prays for an Order of the Court so holding.

Respectfully submitted,

Edna Jenelle Coulter
219 McGowan Avenue
Bardstown, Kentucky 40004
502-348-7045
Counsel for Petitioner

APPENDIX

CR 11 SIGNING OF PLEADINGS, MOTIONS, AND OTHER PAPERS; SANCTIONS

Every pleading, motion and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by Rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certification by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee. The Court shall postpone ruling on any Rule 11 motions filed in the litigation until after entry of a final judgment.

NO. 88-CI-00812 JEFFERSON CIRCUIT COURT
DIVISION NINE (9)
JUDGE JUDITH MCDONALD-BURKMAN

BARNETT BANK OF TAMPA, N.A. PLAINTIFF

v.

PEOPLES STATE BANK OF
CHAPLIN, KENTUCKY DEFENDANT

ORDER IMPOSING SANCTIONS UNDER CR 11

******

Upon the motion of Barnett Bank of Tampa, N.A., n/k/a Bank of America ("Barnett Bank") and Peoples State Bank of Chaplin, Kentucky ("Peoples Bank"), for sanctions under CR 11 against Movants, Warren Pulliam ("Pulliam"), Janice L. Pulliam, Kerry W. Pulliam, Paul A. Sims, Chaplin Insurance Agency, Inc., and W & J Pulliam, Inc. (collectively "Movants") and Movants' counsel, and the Court having held a hearing and having heard and considered the written and oral arguments of the parties, the Court being otherwise duly and sufficiently advised finds as follows:

1. The following pleadings were filed and served herein by the Movants and their counsel: Intervening Defendants' Motion to Set Aside Judgment, served 02/17/05; Intervening Defendants' Memorandum in Support of Motion to Set Aside Judgment, served 02/17/05; Motion to Intervene and for Evidentiary Hearing, served 02/17/05; Memorandum in Support of Motion to Intervene and for Evidentiary Hearing, served 02/17/05; Memorandum in Support of Motion to

Intervene and for Evidentiary Hearing, served 02/17/05; Motion to Alter, Amend or Vacate, served 03/21/05; Movant's Reply to Response of Peoples State Bank of Chaplin, Kentucky, n/k/a King Southern Bank to Motion to Alter, Amend or Vacate, served 04/11/05; Motion for Evidentiary Hearing, served 04/28/05; Movants' Supplemental Reply to Response of Peoples State Bank of Chaplin, Kentucky n/k/a King Southern Bank to Motion to Alter, Amend or Vacate, served 06/06/05; and Movant's Response to Memorandum of Barnett Bank of Tampa, N.A., n/k/a Bank of America in Opposition to Motion of Movants to Alter, Amend or Vacate the Court's March 9, 2005 Order and for Sanctions, served 06/30/05.

2. The Motions and other documents listed above violated CR 11 because: (a) these motions and other referenced documents were not supported by **any** facts that would meet the Movants' "special burden" for filing a motion to intervene after a judgment had been entered in this action, *Arnold v. Commonwealth, ex rel. AG,* 62 S.W.3d 366 (Ky. 2001); (b) the motions and supporting documents filed in support of intervention were untimely having been filed approximately 16 years after the agreed judgment had been entered in this case, *Arnold v. Commonwealth, ex rel. AG,* 62 S.W.3d 366 (Ky. 2001); (c) the relief requested in the motions and other documents referenced above was not warranted by existing law or by a good faith argument for the extension, modification or reversal of existing law as Movants and counsel have cited no "viable basis" supporting the relief requested in those documents; and (d) it can be inferred from the fact that the motions and supporting documents were not well grounded in fact or warranted by existing law or even a good faith argument for the extension, modification or reversal of existing law that the motions and

supporting documents were filed for an improper purpose.

3. The attorney fees claimed by Barnett Bank and Peoples Bank are reasonable under the circumstances and the amount of the fees claimed should be awarded in full.

4. Barnett Bank is hereby awarded its fees in the amount of $11,244.48 against both the Movants and their counsel, Ronald E. Hines, jointly and severally.

5. Peoples Bank is hereby awarded its fees in the amount of $16,533.00 against both the Movants and their counsel, Ronald E. Hines, jointly and severally.

6. Said awards are to be paid to Barnett Bank and Peoples Bank within 60 days from the date of entry of this Order.

IT IS SO ORDERED.

Judith McDonald-Burkman
Judge, Jefferson Circuit Court

Date: 12-21-05

Tendered by:
Janet P. Jakubowicz
Elizabeth S. Gray
GREENEBAUM DOLL & McDONALD, PLLC
3500 National City Tower
101 South Fifth Street
Louisville, Kentucky 40202-3197
(502) 589-4200

COUNSEL FOR PLAINTIFF BARNETT
BANK OF TAMPA, N.A., n/k/a BANK OF AMERICA

Commonwealth of Kentucky
Court of Appeals

ACTION NO. 88-CI-000812

RONALD E. HINES — APPELLANT

v.

BARNETT BANK OF TAMPA, N.A., N/K/A BANK OF AMERICA; PEOPLES STATE BANK OF CHAPLIN, KENTUCKY, N/K/A KING SOUTHERN BANK; WARREN L. PULLIAM; JANICE L. PULLIAM; KERRY W. PULIAM; PAUL A. SIMS; CHAPLIN INSURANCE AGENCY, INC.; AND W & J PULLIAM, INC.
APPELLEES

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE

NO. 2006-CA-000217-MR

WARREN L. PULLIAM; JANICE L. PULLIAM; KERRY W. PULLIAM; PAUL A. SIMS; CHAPLIN INSURANCE AGENCY, INC.; AND W & J PULLIAM INC.
APPELLANTS

v.

BARNETT BANK OF TAMPA, N/K/A BANK OF AMERICA;

PEOPLES STATE BANK OF CHAPLIN, KENTUCKY, N/K/A KING SOUTHERN BANK; AND RONALD E. HINES APPELLEES

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE

ACTION NO. 88-CI-000812

OPINION
DISMISSING IN PART,
AND AFFIRMING IN PART

** ** ** ** **

BEFORE: ACREE, CLAYTON, AND WINE, JUDGES.

ACREE, JUDGE: This is the consolidated appeal of Warren L. Pulliam (Pulliam), Janice L. Pulliam, Kerry W. Pulliam, Paul A. Sims, Chaplin Insurance Agency, Inc. and W & J Pulliam, Inc. (Pulliam Appellants), and the Pulliam Appellant's former attorney, Ronald E. Hines. The appeal arises from the Pulliam Appellants' unsuccessful efforts to intervene and set aside an agreed order, entered in 1989, dismissing a lawsuit between the Appellees, Barnett Bank of Tampa, N.A., n/k/a Bank of America (Barnett Bank) and Peoples State Bank (Peoples) of Chaplin, Kentucky, the plaintiff and defendant below, respectively. Additionally, the Pulliam Appellants and Hines contest sanctions imposed against them as a result of the

attempted intervention. We dismiss in part and affirm in part.

Because the Pulliam Appellants present arguments grounded in constitutional due process guarantees, we are obligated to present the relevant facts and procedure of this case in some detail.

I. FACTS AND PROCEDURE

Pulliam was once the president and principal owner of Peoples. In 1986, Pulliam agreed to indemnify Peoples for losses arising from his wrongful issuance of certified checks. He and Peoples entered into a restitution agreement to that effect, but Pulliam later brought suit in Nelson Circuit Court against Peoples and one of its directors, James King, to set aside that agreement. That litigation terminated when the parties entered into a settlement agreement in which Pulliam admitted his wrongdoing, reaffirmed his obligation to indemnify Peoples for all losses and expenses, and released Peoples and King from all claims. Pulliam has attempted to resurrect that case by means of post-trial motions.

On February 1, 1988, Barnett Bank filed the underlying lawsuit against Peoples in Jefferson Circuit Court, seeking reimbursement for sums it had been induced to pay to Peoples as a result of Pulliam's misconduct. Pulliam admittedly knew of the lawsuit, in fact gave his deposition in the case, but did not attempt to intervene at that time. In 1989, Peoples and Barnett Bank settled their dispute when Peoples paid Barnett Bank the sum of $200,000 in exchange for a release of all claims. An agreed order of dismissal with prejudice was entered on October 12, 1989.

In May 1990, Peoples' subrogee, Ohio Casualty, sued Pulliam in federal district court seeking indemnity, contribution, and subrogation for amounts paid as a result of Pulliam's misdeeds while at Peoples.

In July 1992, pursuant to a jury verdict, the United States District Court entered a judgment against Pulliam in the amount of $200,000.00. Pulliam did not appeal. However, he has since unsuccessfully attempted on several occasions to avoid or delay his obligation to Oho Casualty. He filed motions to set aside the judgment pursuant to Federal Rules of Civil Procedure (FRCP) 60(b) in 1995 and 2004.

On February 11, 1992, Pulliam was convicted in the United States District Court for the Western District of Kentucky at Louisville on one count of bank fraud and three counts of aiding and abetting bank fraud. His sentences of one year for each offense were to run concurrently, though execution of the sentence was suspended and Pulliam was placed on probation for a period of five years.

On February 17, 2005,[1] more the fifteen years after the underlying lawsuit had been dismissed, the Pulliam Appellants filed a motion to intervene and to set aside the Jefferson Circuit Court's 1989 order of dismissal. They claimed the settlement and agreed order of dismissal entered into between Peoples and Barnett Bank was accomplished by the perpetration of a fraud upon the court. On March 8, after consideringthe lengthy motions and memoranda, the trial court denied Appellants' motion.

The Pulliam Appellants, on March 21, filed a motion to alter, amend, or vacate that March 8 order. The motion was argued before the trial court of June 20. Hines presented the Pulliam Appellants' factually unsupported allegations of collusion and fraud upon Peoples or the trial court, or both. Peoples' counsel responded with a recitation of Pulliam's various attempts to collaterally attack the judgments that had been entered against him. She concluded by generally requesting the trial court to keep open the possibility

[1] All of the events relative to this review occurred in 2005. Therefore, unless otherwise noted, dates given are in the calendar year 2005.

of awarding sanctions on a proper motion.

On July 13, the court entered an order denying the motion to vacate its previous order, holding there was "no viable basis to allow Movants to intervene in this 1988 case which came to final judgment in 1989."

A month later, on July 21, Peoples filed a motion pursuant to Kentucky Rules of civil Procedure (CR) 11 for sanctions against Hines and the Pulliam Appellants. The very next day, Hines, on behalf of his clients and by necessary implication on his own behalf, filed an "Objection to Motion for Sanctions" because a prior obligation prohibited his attendance at the hearing.

When the trial court called the docket on July 25, counsel for Peoples represented to the trial court that she had spoken with Hines' assistant and agreed to allow Hines time to respond to the motion, and to allow Peoples time to reply to that response. Counsel for Barnett Bank was also in attendance, having filed its own CR 11 motion for sanctions that morning. That motion was served upon Hines himself, and upon the Pulliam Appellants through Hines, on July 25. The trial judge entered on July 26 setting the agreed-upon briefing schedule.

On August 8, Hines, again on behalf of his clients and himself, filed a response both to Peoples' and to Barnett Bank's motion for sanctions.

On August 25, the Pulliam Appellants filed their own, unrelated motion to certify as final the March 8 order denying intervention and the July 13 order denying the motion to vacate the previous order. Hines noticed that motion to be heard on August 29. Peoples' counsel and Barnett Bank's counsel appeared at the hearing, but Hines did not. Noting their desire to keep client cost to a minimum, they declined the court's offer of time to submit a response to Hines' motion. Instead, however, they presented to the trial court a copy on

Appellants' motion, *Ashland Public Library Bd. Of Trustees v. Scott,* 610 S.W. 2d 895 (Ky. 1981).

Shortly after the hearing and with leave of court, both counsel submitted supplemental affidavits supporting their claim for CR 11 sanctions. Those affidavits reflected the time they had spent and costs expended preparing for and attending the August 29 hearing, a hearing Hines himself failed to attend. Furthermore, they set forth the supplemental argument that Hines' motion to certify the March 8 and July 13 orders also failed to meet the requirements of CR 11.

On September 2, before he could respond to these supplemental affidavits, Hines was injured in an unfortunate fall. On September 8, with Hines' apparent authority and on his behalf, attorney Gary Tabler filed a motion to continue the case for thirty days or until further orders of the Court. The next day, Hines wrote to counsel for Peoples seeking an agreed order allowing him to withdraw from representation of the Pulliam Appellants. On September 15, Peoples' counsel responded to Hines' letter. She had obtained permission from Barnett Bank's counsel to speak for them both. They had no objection to Hines' withdrawal. However, they emphasized that it would be inappropriate for us to sign and Agreed Order Regarding your withdrawal, particularly in light of the pending Motions of Sanctions that both my client and Barnett Bank intend to pursue. [emphasis supplied].

Those motions, it went without saying, were not only against the Pulliam Appellants, but against Hines himself.

Hines filed his motion to withdraw on October 3, 2005, and for an additional sixty days to allow the Pulliam Appellants time to find new counsel. That motion was to be heard on October 10. Again, when the trial court called the docket, counsel for Peoples and Barnett Bank were present. Hines failed to appear or

to send a surragote.

The court was not inclined to allow the continuance of the case for an additional sixty days. Counsel for Barnett Bank informed the court that Tabler, who had signed Hines' September 8 motion seeking a continuance, was already representing the Pulliam Appellants in the Nelson Circuit Court action. Hines' assistant had informed counsel that Tabler intended to enter an appearance in the case. The trial court granted Hines' motion for leave to withdraw on October 11, but denied the sixty-day continuance.

On October 18, Tabler filed a motion to substitute as counsel for the Pulliam Appellants. The motion was heard on October 24. At the hearing, Appellees' counsel believed it appropriate to ask for a hearing on their CR 11 motions. Tabler did not object but sought and obtained additional time to respond to the Appellees' supplemental affidavits. Tabler, as counsel for the Pulliam Appellants, and counsel for each of the Appellees, presented oral argument to the trial court on December 14, 2005.

On December 21, the circuit court entered an order granting the CR 11 motions and awarding sanctions against the Pulliam Appellants and Hines, jointly and severally, in favor of Peoples and Barnett Bank in the amounts of $11,224.48 and $16,533.00, respectively.

The Pulliam Appellants filed their notice of appeal with this Court on January 20, 2006. Specifically, the appealed: (1) the March 9 order denying intervention; (2) the July 13 order denying the motion to vacate the March 9 order; and (3) the December 21 order imposing CR 11 sanctions.

Hines filed his own notice of appeal of the only order that affected him, the December 21 order granting sanctions.

The appeals have been consolidated for our review.

We first address the Appellees' contention that the Pulliam Appellants' appeal from the March 9 and July 13 orders is untimely and should be dismissed. Appelleees' first raised the issue before this Court on their joint motion to dismiss. A three-judge motion panel denied the motion, but granted leave to renew the argument as part of their arguments submitted to the merits panel. We have considered this argument and believe it to have merit.

II. UNTIMELY APPEALS

In response to Appellees' motion to dismiss before this Court, the Pulliam Appellants argued that the March 9 and July 13 orders were interlocutory. Thus, they argue, when the circuit court denied their motion to certify the orders pursuant to CR 54.02, the orders did not become final and appealable until the court entered its December 21 order ruling on the motion for sanctions, at which point it dispensed with all of the matters pending before it. Appellants are wrong. The circuit court correctly relied upon *Ashland Public, supra,* and properly denied the Pulliam Apppellants' motion to certify the judgments.

In *Ashland Public Library, supra,* our Supreme Court was asked to decide whether the order of a trial court denying a motion to intervene in a civil action was an appealable final order even though it did not contain a recitation of the language set forth in CR 54.02(1). In holding that the denial was final, the Court reasoned:

> The provisions of CR 54.02(1) do not encompass orders denying intervention. Applicants for intervention are not parties to an action and do not present claims for relief in an action unless and until they are permitted to intervene. Rather, they seek to become so that they

> may then assert a claim or defense in the action. CR24.03.

Ashland Public Library at 896.

While *Ashland Public Library* dealt with a pre-judgment motion to intervene, we hold that its underlying principle applies as well to post-judgment motions to intervene. The March 9 and July 13 orders were immediately final and appealable and did not require CR 54.02 language to be so. Once thirty days passed after the entry of each of those orders, it was to late to appeal them.

The Pulliam Appellants argue alternatively that the orders were not final and appealable because Appellees moved for the imposition of sanctions against the Appellants before the issuance of the July 13 order.[2] In disregard of CR 76.12(4)(c)(iv)[3], Appellants do not cite any portion of the record for this assertion. We presume it refers to Peoples' counsel's comments at the June 20 hearing on the motion to vacate when she noted that the motion so lacked as to subject the parties to sanctions. In any event, a motion for sanctions is collateral to the merits of the case, *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 398, 110 S.Ct. 2447, 2457, 110 L.Ed.2d 359 (1990), and does not extend or toll the time for filing an appeal of a final judgment.

CR 73.02(2) provides that "[t]he failure of a party to file timely a notice of appeal, cross-appeal, or motion for discretionary review shall result in a

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[2] The Pulliam Appellants do not repeat this argument in their brief. It appears only in their response to the motion to dismiss presented to the Court of Appeals' motion panel. We address it nevertheless.

[3] When a party fails to comply with CR 76.12(4)(c)(iv), nothing less than manifest injustice will *obligate* this Court to serve the advocate's function of searching the record to substantiate a party's assertion of fact. See *Elwell v. Stone*, 799 S.W.2d 46, 47-48 (Ky. App. 1990)

dismissal or denial." Under these circumstances, we are obligated by this rule to dismiss the Pulliam Appellants' appeal from the March 9 and July 13 orders, for failure to timely file a notice of appeal.

What remains are Appellants' appeals of the December 21 order imposing sanctions against them. Regarding this order, both Appellants filed timely notices of appeal.

III. STANDARD OF REVIEW

In *Clark Equipment Company, Inc. v. Bowman,* 762 S.W.2d 417 (Ky. App. 1988), this Court reviewed an order denying the imposition of CR 11 sanctions. Necessarily, the Court adopted a standard of review of such orders.

> We believe . . . that where sanctions have been denied, our review is limited to a determination of whether the trial court abused its discretion.

Clark, 762 S.W.2d at 420 (emphasis supplied). The court did not stop there, however, in *dicta,* this Court suggested the standard Kentucky would adopt if presented with a review of the imposition, rather then the denial, of CR 11 sanctions.

> While some courts apply an across-the-board abuse of discretion standard of review to all Rule 11 rulings, *e.g., Mihalik v. Pro Arts, Inc.,* [851 F.2d 790, 793 (6th Cir. 1988)], we think where sanctions are imposed our role requires a multi-standard approach, that is, a clearly erroneous standard to the trial court's findings in support of sanctions, a de novo review of the legal conclusion that a violation occurred, and an abuse of

> discretion standard on the type and/or amount of sanctions imposed.

Id. At 421 (emphasis supplied).

Despite its status as *dicta,* the multi-standard approach has been acknowledged subsequently by our Court in unpublished opinions.[4] The federal system, from which we adopted CR 11, has taken a different course.

Two years after *Clark* declined to follow. *Cooter & Gell v. Hatrmarx Corp.*, 496 U.S. 384, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990). Today, twenty years after *Clark* was rendered, the vast majority of state courts apply the unitary abuse-of-discretion standard of review.[5] Only One other state, Utah, adheres to the

[4] See, *e.g., Caudill v. Thomas,* 2007 WL 2340785, p.2 (Ky. App. Aug 03, 2007)(No. 2006-CA-00664-MR, 2006-CA-000884-MR). We particularly appreciate Judge Guidugli's opinion in *Smith v. Miller,* 2003 WL 22681426, pp. 7-9 (Ky. App. Nov 14, 2003) (No. 2002-CA-001146-MR) in which he recognized the adoption of the unitary abuse-of-discretion standard in *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 110 S. Ct. 2447, 110 L. Ed.2d 359 (1990), noting that "[m]any federal district and appellate courts, including the Sixth Circuit Court of Appeals, as well as many state courts have followed this holding."

[5] Forty states and the District of Columbia utilize the unitary abuse-of-discretion standard: *Pacific Enterprise Oil Co. (USA) v. Howell Petroleum corp.*, 614 So.2d 409, 425 (Ala. 1993); *Enders v. Parker,* 125 P.3d 1027, 1031 (Alaska 2005); *Hmielewski v. Maricopa County,* 192 Ariz. 1, 4, 960 P.2d 47, 50 (Ariz. App. 1997); *Weaver v. City of West Helena,* 367 Ark. 159, 238 S.W.3d 74, 77 (Ark. 2006); *580 Folsom Associates v. Prometheus Development Co.*, 223 Cal. App.3d 1, 19-20, 272 Cal. Rptr. 227, 236 (Cal. App. 1990)(reviewing order entered pursuant to then-existing corollary sanctions rule, Cal.C.C.P. § 128.5) and *Eichenbaum v. Alon,* 106 Cal. App.4th 967, 997, 131 Cal. Rptr.2d 296, 302 (Cal. App.2003) (reviewing order entered pursuant to current rule modeled after FRCP 11, Cal.C.C.P. §128.5); *In re Trupp,* 92 P.3d 923, 932 (Colo. 2004); *Ossen v. Wanat,* 21 Conn. App. 40, 48, 571 A.2d 134, 138 (Conn.App. 1990) (reviewing order entered pursuant to Practice Book § 111 which is only similar in nature to Rule 11); *Wilson v. B & R Transporters, Inc.*, No. C.A. 93C-05-019, 1994 WL 381001, at 1-2 (Del. Super. June 10, 1994) (applying *Cooter* but concluded ultimately that

"there exist no effective method of reviewing a [Del. Misc. R.] Rule 5 [Delaware's version of Rule 11 for Justices of the Peace] sanction."); *Montgomery v. Jimmy's Tire & Auto Center, Inc.*, 556 A.2d 1025, 1028 (D.C. 1989); *Walden v. Shelton*, 270 Ga. App. 239, 242, 606 S.E.2d 299, 302 (Ga. App. 2004); *Gonsalves v. Nissan Motor Corp. in Hawaii, Ltd.*, 100 Haw. 149, 58 P3d 1196, 1206 (Haw. 2002); *Lester v. Salvino*, 141 Idaho 937, 939, 120 P.3d 755, 757 (Idaho App. 2005); *Krawczyk v. Livaditis*, 366 Ill. App.3d 375, 379, 851 N.E.2d 862, 865 (Ill. App. 2006); *Kahn v. Cundiff*, 533 N.E.2d 164, 167 (Ind. App. 1898); *Weigel v. Weigel*, 467 N.W.2d 277, 280 (Iowa 1991); *Wood v. Groh*, 269 Kan. 420, 429 7 P.3d 1163, 1171 (Kan.2000); *Green v. Wal-Mart Store No. 1163*, 684 So.2d 966, 968 (La. App. 1996); *Estate of Dineen*, 721 A.2d 185, 188 (Me. 1998); *Vittands v. Sudduth*, 49 Mass. App. Ct. 401, 412, 730 N.E.2d 325, 336 (Mass. App. Ct. 2000); *Radloff v. First Am. Nat'l Bank*, 470 N.W.2d 154, 156 (Minn. App. 1991); *Eatman v. City of Moss Point*, 809 So.2d 591, 593 (Miss. 2000); *Harrington v. Farmers Union Co-Op. Ins. Co.*, 13 Neb. App. 484, 488, 696 N.W.2d 485, 490 (Neb. App. 2005); *Office of Washoe County dist. Atty. v. Second Judicial Dist. Court ex. Rel. County of Washoe*, 116 Nev. 629, 636, 5 P.3d 562, 566 (Nev. 2000); *Masone v. Levine*, 382 N.J. Super. 181, 193, 887 a.2d 1191, 1198 (N.J. Super. A.D. 2005); *Rangel v. Save Mart, Inc.*, 140 N.M. 395, 399, 142 P.3d 983, 987 (N.M. App. 2006); *Dobrie v. Dobrie*, 236 A.D.2d 583, 654 N.Y.S.2d 652, 653 (N.Y. A.D. 1997); *Harris v. Daimler Chrysler Corp.*, 638 S.E.2d 260, 268 (N.C. App. 2006); *Simpson v. Chicago Pneumatic Tool Co.*, 693 N.W.2d 612, 618 (N.D. 2005); *Burrell v. Kassicieh*, 128 Ohio App.3d 226, 714 N.E.2d 442, 445 (Ohio App. 1998); *State ex rel. Tal v. City of Oklahoma City*, 61 P.3d 234, 240 (Okla. 2002); *Taylor v. Kerber*, 171 Or. App. 301, 308-09, 15 P.3d 93, 98(Or. App. 2000); *Francis v. Brown*, 836 A.2d 206, 212 (R.I. 2003); *Prunty Const., Inc. v. City of Canistota*, 682 N.W.2d 749, 761 (S.D. 2004); *Krug v. Krug*, 838 S.W.2d 197, 205 (Tenn. Ct. App. 1992); *Breckenridge v. Nationsbank of Texas, N.A.*, 79 S.W.3d 151, 157 (Tex. App.-Texarkana 2002); *Williams & Connelly, L.L.P. v. People for Ethical Treatment of Animals, Inc.*, 273 Va. 498, 509, 643 S.E.2d 136,140 (Va. 2007); *Bigelow v. Bigelow*, 171 Vt. 100, 108, 759 A.2d 67, 72 (Vt. 2000); *In re Marriage of Rich*, 80 Wash. App. 252, 258, 907 P2d 1234, 1237 (Wash. App. 1996); *Bartles v. Hinkle*, 196 WVA. 381, 389, 472 S.E.2d 827, 835 (WVA. 1996); *Riley v. Isaacson*, 156 Wis.2d 249, 256, 456 N.W.2d 619, 622 (Wis. App. 1990); *LC v. TL*, 870 P.2d 374, 381 (Wyo. 1994). Only six states utilize any different standard: *Mercedes Lighting and Elec. Supply, Inc. v. State, Dept. of General Services*, 560 S.2d 272, 277 (Fla. App. 1990)("whether a pleading or motion is legally sufficient involves a question of law subject to *de novo* review by the appellate court"); *Jerico Const., Inc. v. Quadrants, inc.*, 257 Mich. App. 22, 33, 666 N.W.2d 310, 318 (Mich. Mich. App. 2003)("clear error"); *Kranz v. Director of Revenue*, 764 S.W.2d 508, 509 (Mo. App. 1989)(*de novo* review); *Byrum v. Andren*. 337 Mont. 167, 159 P.3d 1062, 4068-69 (Mont. 2007)(two-tiered

same multi-standard approach embraced in *Clark*. We believe it is time Kentucky joined the majority of the states, not because of the popularity of the unitary approach, but because its underlying rationale is superior to the rational for formally adopting the *Clark dicta*.

Since *Cooter*, only Utah, Hawaii, and Texas have occasion to reconsider in depth the rationale and implications of these two different standards.

The Utah Supreme Court addressed its standard of review of Rule 11 sanctions for the first time in *Barnard v. Sutliff*, 846 P.2d 1229 (Utah 1992). After considering the unitary abuse-of-discretion standard of *Cooter*, the Utah court declared the opinion "confusing[.] *Id.* at 1234.

> Even if we could make some sense of the conflicting statements in *Cooer & Gell*, we decline to adopt the abuse of discretion standard as the sole standard of review of a trial court's rule 11 findings. We think that an abuse of discretion standard would vest to much discretion in the trial courts on questions of law. The resulting indeterminacy would create great uncertainty in the area that already

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approach; "a district court's findings of fact will be overturned if clearly erroneous, and a court's legal conclusion that the facts constitute a violation of Rule 11 will be reversed if the determination constitutes an abuse of discretion."); *Father v. South Carolina Dept. of Social Services*, 353 S.C. 254, 578 S.E.2d 11 (S.C. 2003)(South Carolina Constitution requires the appellate court to "take its own view of the facts" determined by a trial judge sitting as a court of equity and, therefore, is constitutionally obligated to reject the unitary abuse-of-discretion standard.); *Morse v. Packer*, 115 P.3d 1021, 1025 (Utah 2000)(multi-standard approach, identical to *Clark*, 762 S.W.2d at 420). Our review of Maryland, New Hampshire, and Pennsylvania case law appears to indicate that appellate courts in those states have not yet had the occasion to address.

> suffers from ambiguity in the governing standard of conduct.

Id. Rejecting all others standards, the court concluded "that Utah appellate courts should use the three-standard approach" because "[I]t uses understood standards of review" and "is consistent with the rule 11 jurisprudence that Utah appellate courts have developed thus far." *Id.* at 1235.

With due regard to the Utah analysis, we believe we understand *Cooter*. We note too that the unitary standard also uses on of the "understood standards of review" – abuse of discretion. Finally, we find the analysis and rational of the Hawaii and Texas courts are a more comfortable fit with Kentucky jurisprudence.

In *Matter of Hawaiian Flour Mills, Inc.,* 868 P.2d 419 (Haw. 1994), Hawaii's Supreme Court rejected the multi-standard approach which had been adopted only two years earlier by Hawaii's intermediate appellate court in *De Silva v. Burton,* 832 P.2d 284 (Haw.App 1992). The court reversed *De Silva* and adopted the unitary abuse-of-discretion standard.

The Hawaii court noted first the similarities of the two standards. "Under both the three-tiered and unitary abuse of discretion standards, a trial court 'would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence.'" *Id.* at 433, *quoting Cooter,* 496 U.S. at 405, 110 S.Ct. at 2461. Furthermore, "under both standards the appropriateness of the sanction imposed is reviewed for abuse of discretion." *Id.* at 433

The Hawaii court then focused on the real difference in the two standards, namely, the degree of deference given to the trial court's conclusion that a particular pleading, motion or other paper violated, or did not violate, rule 11. We agree with the Hawaii

court that while such a determination "may be described as a conclusion of law, [it] is more appropriately reviewed for abuse of discretion." *Id.*

We also agree with the three factors underpinning the Hawaii court's reasoning.

First, "a Rule 11 inquiry is heavily fact-intensive, requiring careful consideration fo the particular circumstances of each case, and involving questions of reasonableness, credibility and, often, motive[,]" *id.*, and the trial court is in the best position to asses all three.

Second, the trial courts are "[d]eployed on the front lines of litigation" and are "best acquainted with the local bar's litigation practices and thus best situated to determine when a sanction is warranted to serve Rule 11's goal of specific and general deterrence." *Id.* (citation omitted). Furthermore, adoption of the unitary standard will "enhance[e] these courts' ability to control the litigants before them." *Id.* (citation and quotation marks omitted).

Third, given the fact-dependent nature of the trial court's Rule 11 determination, "little will be lost in terms of ensuring uniformity in the application of Rule 11 sanctions [since fjact-bound resolutions cannot be made uniform through appellate review, *de nova* or otherwise." *Id.* at 434 (citation and quotation marks omitted).

When the Texas Court of Appeals likewise rejected the multi-standard approach in *Home Owners Funding Corp. of American v. Scheplper,* 815 S.W.2d 884 (Tex.App. 1991), it relied on some additional reasoning from *Cooter*. The multi-standard approach, noted the court, would require an appellate court to determine whether the attorney's legal arguments were plausible at the time the pleadings were filed. "[S]uch investment of time and energy by the appellate court will either fail to produce the normal law-clarifying benefits that come from an appellate decision

on a question of law, or else will strangely distort the appellate process by "engendering incongruent opinions from an intermediate court that typically does not review such cases *en banc*. *Id.* at 888 (citation and quotation marks omitted; A *de novo* review would only create a myriad of opinions by appellate courts concerning what constitutes conduct which violates Rule [11], creating, rather than reducing, confusion on what guidelines lower courts should apply in these cases.").

The policy considerations identified by the Supreme Court in *Cooter*,[6] and by the Hawaii and Texas courts, are at least equally applicable in Kentucky. Therefore, we distinguish *Clark Equipment Company, Inc. v. Bowman* , 762 S.W.2d 417 (Ky.App. 1988) from the case before us and adopt the unitary abuse-of-discretion standard for review of all aspects of the imposition of Rule 11 sanctions by the trial court.

While both Hines and Pulliam eventually argue that the pleadings they filed did not violate CR11, thereby calling for our application of the unitary standard, they first urge jurisdictional and procedural basis for reversal. These arguments involve purely legal questions which we will always review *de nove*. *Baze v. Rees,* 217 S.W.3d 207, 209 (Ky. 2006).

Sections IV and V, *infra,* address arguments unique to Hines. Sections VI and VII, *infra,* address arguments presented by the Pulliam Appellants only. Sections VIII and IX, *infra,* address arguments common to all appellants.

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[6] Because CR 11 was based on the FRCP 11, federal case law construing FRCP 11 is persuasive authority with regard to the meaning of CR 11. *Taylor v. Morris,* 62 S.W.3d 377, 379 (Ky. 2001)(Where Kentucky procedural rule "mirrors" federal rule of procedure, "federal court decisions interpreting the latter rule may be accepted as persuasive authority[.]").

IV. ATTORNEY'S WITHDRAWAL DOES NOT AVOID SANCTIONS

Hines first asserts that Jefferson Circuit Court lost jurisdiction to impose sanctions against him because it entered an order permitting his withdrawal on October11 – more then two months before imposing those sanctions. There is not Kentucky case addressing this question. However, our review of persuasive authority leaves not doubt that Hines' position is untenable. Again we find the United States Supreme Court's position on this issue persuasive.

In *Cooter*, the Supreme Court explicitly rejected the Second Circuit's position – unique amount the circuits – that "a voluntary dismissal acts as a jurisdictional bar to further Rule 11 proceedings." *Cooter*, 496 U.S. at 394-95, 110 S.Ct. at 2455 (*citing Johnson Chem. Co. v. Home Care Prods., Inc.*, 823 F.2d 28, 31 (2d Cir.1987)).[7] We, too, reject this argument.

Initially, we not that Hines' relationship with Kentucky courts is not, in the strictest sense, jurisdictionally based. By accepting admission to the practice of law in Kentucky, Hines voluntarily undertook the serious responsibilities of serving as an officer of every court in this Commonwealth. *Kentucky Bar Ass'n v. Cowden*, 727 S.W.2d 403, 405 (Ky.1987)("[A] licensed attorney . . . is an officer of the

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[7] This rule established by Cooter was partially superseded by the amendment of FRCP 11 in 1993 to include a "safe harbor" provision. This provision requires a party seeking Rule 11 sanctions to wait 21 days from service of the motion before filing it with the court in order to give the offending party the opportunity to withdrawal or appropriately correct the challenged paper, claim, defense, contention, allegation, or denial. FRCP 11(c)(1)(A). Consequently, a federal court con no longer issue sanctions under FRCP in a case where, as in *Cooter*, a complaint was voluntarily dismissed with 21 days of the request for Rule 11 sanctions. *Photocircuits Corp. v. Marathon Agents, Inc.*, 162 F.R.D 449, 452 (E.D. N.Y. 1995). Kentucky's CR 11 has not been modified since 1989 and therefore does not include the "safe harbor" provisions of FRCP 11.

court and has an ethical duty to comply with all proper court procedure."). When Hines filed pleadings in this case, he subjected himself specifically to the inherent power of the Jefferson Circuit Court to see that Hines, and any party he represents, abides by that court's orders and rules. Those rules include CR 11.

The imposition of CR 11 sanctions against an attorney is a matter merely collateral to, and clearly independent of, the merits of a case. *Cooter*, 496 U.S. at 398. Until Hines invoked the jurisdiction of the appellate court, the Jefferson Circuit Court retained jurisdiction of the case even after the merits were no longer pending. *Id.* at 395. Consequently, that court also retained its inherent power to sanction an attorney who violated its orders of rules in that case. *Id.* at 395-96.

> It is well established that a . . . court may consider collateral issues after an action is no longer pending . . . Like the imposition of cost, attorney's fees, and contempt sanctions, the imposition of a Rule 11 sanction is not a judgment on the merits of an action. Rather, it requires the determination of a collateral issue: whether the attorney has abused the judicial process, and, if so, what sanction would be appropriate.

Id. Cooter went on to hold that a trial court did not lack jurisdiction to address this collateral issue even "after the principal suit has been terminated [by voluntary dismissal]."*Id.* The rational was obvious. "If a litigant could purge his violation of rule 11 merely by taking a dismissal, he would lose all incentive to 'stop, think and investigate more carefully before serving and filing papers.'" *Cooter*, 496 U.S. at 398; *see also, Frank Annino & Sons Construction, Inc. v. McArthur*

Restaurants, Inc., 215 Cal. App.3d 353, 359, 263 Cal. Rptr. 592 (Cal. App. 2 dist. 1989)("Adopting appellants' position would [mean a] party or an attorney could act in the most egregious bad faith . . . with impunity [and] avoid sanctions by simply dismissing the action[.]").

Nothing impedes the application of the same principle and underlying rational to Hines' argument that his withdrawal deprived the trial court of jurisdiction to impose Rule 11 sanctions upon him. If an attorney could purge or avoid his rule 11 violation merely by withdrawing from representation in a case before the imposition of the sanction, he would lose all incentive to investigate more carefully before filing a civil action. *In Re Itel Securities Litigation,* 791 F.2d 672, 675 (9th Cir. 1986) ("There is absolutely no hint . . . that a lawyer may escape sanctions for misconduct simply by withdrawing from a case before opposing counsel applies for sanctions.").

"As the Rule 11 violation is complete when the paper is filed, " Hines' withdrawal from representation "does not expunge the violation." *Cooter* at 385; *see also,* 2 James Wm Moore *et al,* Moore's Federal Practice §11.23[6][a] (3d ed. 1999), *citing Itel* at 675, and *Lepucki v. v. Wormer,* 765 F2d 86, 87 n.1 (7th Cir. 1985) ("An attorney who at any point certified that a document complied with Rule 11 is subject to the rule's strictures, regardless of whether he or she remains an attorney of record."); *accord,* Restatement (Third) of Law Governing Lawyers §10, Comment g (2000)("A lawyer remains subject to the court's power to sanction under Federal rule 11, even after the lawyer has withdrawn, so long as the court retains jurisdiction over the case.").

No authority cited by Hines is on point. All of it relates to judgments on the merits against parties dismissed from the subject action. None of his authority addresses the withdrawal of counsel. The argument that the Jefferson Circuit Court lacked

jurisdiction to sanction Hines is without merit.

V. WAIVER OF RIGHT TO PURSUE SANCTIONS MUST BE UNEQUIVOCAL

Hines argues that the Appellees' "failure to object to counsel's withdrawal constituted a waiver of any right they might have to continue seeking sanctions against him." Calling the Appellees' attorneys "highly competent counsel," he still claims they "should have known the rules of law [that] when they stood by and allowed Hines to withdraw as counsel or [sic] record without imposing any objection thereto, that they could not afterward continue seeking sanctions from him." We believe Hines' position is not warranted by existing law or a god faith argument for the extension, modification or reversal of existing law. *See* Section IV, supra.

Furthermore, the actions of Appellees' counsel cannot be construed by any reasonable legal practitioner as factually supporting a finding of waiver. *Pangallo v. Kentucky Law Enforcement Council,* 106 S.W.3d 474, 479 (Ky. App. 2003). It would have been Hines' burden to prove that waiver, *id.*, and we believe, even in the proper forum, he could not do so. The letter he received from Peoples' counsel made it clear that Appellees intended to continue pursuit of sanctions despite his withdrawal. Appellees' counsel even refused to sign an agreed order and, at the hearing on Hines' motion to with withdraw (which Hines did not attend), those counsel stated that they could not agree to Hines' withdrawal, though they did not state that they objected to it. Absent an unequivocal expression or irrefutable proof of each element of waiver, Hines' argument is without merit and must fail.

VI. REPRESENTED PARTY'S SIGNATURE NOT A PRE-REQUISITE TO IMPOSITION OF SANCTIONS

The Pulliam Appellants claim that the trial court "failed to not that CR 11 provides that sanctions may be awarded only against attorneys or parties who have actually signed" the offending pleading or other paper. This argument is refuted by the language of CR 11 itself.

> If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, *[or]* a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee.

CR 11 (emphasis added). The Sixth Circuit has interpreted this very language which also appears in the federal version of the rule.

> [A] non-signing party may be sanctioned under the "represented party" clause of Rule 11 if it is determined that his attorney has filed a pleading or other paper which is frivolous or filed for an improper purpose.

Homico Const. & Development Co. v. Ti-Bert Systems, Inc., 939 F32d 392, 394 (6 th Cir.1991); *see also* 35B C.J.S. Federal Civil Procedure § 1377 ("a client may be sanctioned under Rule 11 even if he or she does not sign the frivolous pleadings').

The Pulliam Appellants' argument that they could not be sanctioned because they did not sign the offending pleadings is without merit.

VII. REPRESENTED PARTY NOT IMMUNE TO CR 11 SANCTIONS WHERE BASES ARE NOT EXCLUSIVLY ERROR OF LAW

The Pulliam Appellants claim (1) that the trial court imposed sanctions on the basis of errors of law only and (2) that "a represented party cannot be sanctioned for errors of law made by his attorney." We need not address the correctness of this second contention though we do not discount the possibility that the Appellants are wrong. *See Byrne v. Nezhat,* 261 F.3d 1075, 1118 (11th Cir.2001), *citing Pellitier v. Zweifel,* 921 F.2d 1465, 1519-20 (11th Cir.1991).[8]

We do not agree with the Pulliam Appellants that the basis of the trial court's sanctions was a legal error only. We begin by noting some of the Pulliam Appellants' factual assertions: (1) Appellees and others colluded; (2) Appellees committed a fraud upon the trial court; and (3) Pulliam was deceived in such a way that he missed the opportunity to intervene before te Appellees entered into the agreed order of dismissal. Other than the unsupported factual averments, the offending motions, to use Judge McDonald-Burkman's phrase, are "not supported by **any** facts[.]" (Emphasis in original)

Appellants also claim in the motion to set aside the agreed order that certain sealed documents contain "evidence which is needed for such proof" of their averments as would satisfy CR 11. This Court examined those sealed documents. Many were

[8] We also note that the federal prohibition against sanctioning a represented party for purely legal errors committed by his attorney is built into FRCP 11(b)(2) and 11(c)(5)(A). This particular prohibition is not reflected in CR 11.

obviously available to Pulliam at one point since they are sealed exhibits to his own deposition. Other sealed documents include correspondence initiated by government banking authorities, portions of which were copied to Pulliam. The remaining documents, despite our careful scrutiny, do not appear to provide any factual support for the Pulliam Appellants' claims in any regard.

While the order does reflect that the motions to intervene were "not warranted by existing law or by a good faith argument for the extension, modification or reversal of existing law[,]" this was not the only foundation upon which the decision to award sanctions was based. The trial court ruled that the motions "were untimely[,] having been filed approximately 16 years after the agreed judgment had been entered" and were "not supported by **any** facts[.]" (Emphasis in original). The trial court further found that the offending documents "were filed for an improper purpose." The trial court did not expressly state that improper purpose. However, it is obvious from the record and arguments of counsel on both sides of the motion that the real purpose was to obfuscate the issues, and to attempt to impact the judgments, in the actions in federal court and in the Nelson Circuit Court.

We have held that "CR 11 . . . forbids the filing of an action for an improper purpose" and have authorized sanctions against both attorney and represented parties where the filing of documents with a court is "frivolous and so totally lacking in merit so as to appear to have been taken in bad faith[.]" *Raley v. Raley*, 730 S.S.2d 531, 531 (Ky. App. 1987).[9] The

[9] Rule 11 sanctions have been upheld even "where the sanctions were not based on bad faith "but on counsel's incompetence in handing [the] matter by making "frivolous" and "worthless" claims "without first making a proper inquiry into the relevant law and facts." *INVST Financial Group, Inc. v. Chem-Nuclear Systems, Inc., 815 F.2d 391, 405 (6th Cir. 1985).*

order in this case clearly shoes that the trial court conducted the proper inquiry, that is, to determine whether the filing of the motion to intervene was "reasonable under the circumstances." *Louisville Rent-A-Space v. Akai,* 746 S.W.2d. 85, 87 (Ky. App. 1988). The trial court answered that question in the negative.

We also note that the Appellants did not seek an additional finding from the trial court, as was their right under CR 52.02, that the basis of the order was solely and erroneous legal theory. In the absence of such a finding, we cannot conclude from our review that such was the case. Appellants' argument to the contrary is without merit.

VIII. DUE PROCESS MUST PRECEDE IMPOSITION OF SANCTIONS

Hines, in his Pre-hearing Statement, and the Pulliam Appellants in their brief, argue that they did not receive proper notice of the motions for sanctions, or an opportunity to be heard. The record shows otherwise.

We construe Appellants' argument as a claim they were denied due process. "[A]lthough the assessment of sanctions under Rule 11 must comport with due process., the procedure employed to assure due process will "depend on the circumstances of the situation and the severity of the sanction under consideration."" *INVST Financial Group, Inc. v. Chem-Nuclear Systems, Inc.* 815 F.2d 391, 405 (6 th Cir. 1987)(quoting FRCP 11, advisory committee note to the 1983 amendment; CR 11 most closely resembles this version of the federal rule). The advisory committee note to FRCP 11 goes on to state, "In many situations the judge's participation in the proceedings provides him full knowledge of the relevant facts and little further inquiry will be necessary."

Legal treatises summarizing the federal courts'

interpretations of Rule 11 illustrate consensus. A trial court

> Adequately safeguards a party's due process rights where the court gives the party opportunity to respond in writing to the sanctions motion and holds a hearing on the motion. However, the opportunity to be heard does not always require an evidentiary hearing.
>
> A formal hearing is not required, for example, when a document is sanctionable on its face, or when the [trial] judge is familiar with the factual basis for sanctions. When an evidentiary hearing is not required, the requirement of an opportunity to be heard may be satisfied by the party's response to the motion for sanctions.

61A Am. Jur. 2d Pleading § 640 (Motions for Sanctions in Federal Practice Under FR Civ P, Rule 11, Opportunity to be Heard – Generally)(footnotes omitted): see also, 35B C.J.S. Federal Civil Procedure § 1386 (Sanctions Proceedings Generally)("no requirement that a full evidentiary hearing be held . . . attorney or party against whom sanctions are imposed must be given notice and an opportunity to be heard or to respond.") While *Clark, supra*, indicates in *dicta* that "a trial court should not impose sanctions without a hearing[,]" *Clark* at 421, we interpret this consistently with the above-cited persuasive authority to mean an "opportunity to be heard."

We have no doubt that due process guarantees were satisfied in this case. *See Kentucky Cent. Life Ins. Co. v. Stephens*, 897 S.W.2d 583,590 (Ky. 1995)("Procedural due process is not a static concept,

but calls for such procedural protections as the particular situation may demand."). The Pulliam Appellants were represented at every stage of the proceeding, first by Hines and finally by Tabler.

Hines presents a slightly different argument. He claims his lack of notice of the December 14 oral argument of the CR 11 motions deprived him of the right to respond. Specifically, he claims he did not have the opportunity to respond to the charge, contained in Appellees' counsels' supplemental affidavit, that his motion to certify the orders denying intervention violated CR 11. This argument fails.

The order imposing sanctions makes no reference to, nor do sanctions appear to be imposed because of Hines' August 25 motion to certify the March 8 and July 13 orders. The focus is upon Hines' filing of the February 17 motion (and memoranda) to intervene and the March 21 motion (and memoranda) to alter, amend, or vacate the order denying intervention. The propriety of those motions was fully debated during the June 20 hearing. Hines fully participated in that hearing. In fact, his participation included his filing of more supporting memoranda with more pages that the local rules permit, and without obtaining leave of the trial court to exceed the limits of those rules. Nevertheless, the trial judge stated she would consider the rule-offending submissions anyway.

There is further indication the trial court did not consider the supplemental affidavits of Appellees' counsel. The award of sanctions in the form of attorney fees only includes those fees incurred through the date each Appellee filed it CR 11 motion in late July. The trial court did not award the additional fees incurred by Peoples ($690.00) and by Barnett Bank ($1023.50) after they filed their respective motions for sanctions. There additional fees are the real subject of Appellees' counsel' supplemental affidavits.

Furthermore, our review of the short, videotaped

December 14 oral argument does not disclose any factual or legal assertion or argument, by any party, not previously presented at the June 20 hearing. We are convinced that oral argument had no bearing on the trial court's decision to impose sanctions.

The Appellants' arguments relating specifically to notice and opportunity to be heard, and generally to due process guarantees, are without merit.

IX. TRIAL COURT DID NOT ABUSE ITS DISCRETION BY IMPOSING CR 11 SANCTIONS AGAINST APPELLANTS AND PULLIAM

We are left with the argument, common to Hines and Pulliam, that because their motion to intervene was meritorious, they could not have violated CR 11. Therefore, they argue, the trial court's order to the contrary should be reversed. We disagree.

We have previously stated that the trail court engaged in the proper inquiry – whether the filing of the motion to intervene was "reasonable under the circumstances." The proper inquiry before this Court is whether the trial court abused its discretion when answering that question in the negative.

The record is, in effect, in two parts. The original action is in two volumes taking up 262 pages, plus Pulliam's deposition and sealed exhibits, and a small number of documents under seal from the Kentucky Department of Financial Institutions. This portion of the record ends on October 12, 1989. The record picks up again, over fifteen years later on February 17, 2005, with Appellants' attempt to intervene. This second portion of the record includes six (6) more volumes, including more than 900 additional pages, and the videotape of eight (8) different court appearances. We have reviewed the entire record in an attempt to glean the factual or legal basis upon which Appellants'

claims might be cognizable. We were unsuccessful.

We therefore hold the trial court did not abuse its discretion by awarding sanctions against Appellants, jointly and severally, equaling only a portion of the attorney fees incurred by each of the Appellees in defending the attempted intervention. The Jefferson Circuit Court's December 21, 2005, order imposing sanctions jointly and severally against Appellants is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT, RONALD E. HINES
Ronald E. Hines, pro se
Elizabethtown, Kentucky

BRIEFS FOR APPELLANT, WARREN L. PULLIAM; JANICE L. PULLIAM; KERRY W. PULLIAM; PAUL A. SIMS; CHAPLIN INSURANCE AGENCY, INC.; AND W & J PULLIAM, INC.:
Gary A. Tabler
Louisville, Kentucky

Supreme Court of Kentucky

2008-SC-0437-D
(2006-CA-0216 & 2006-CA-0217)

JEFFERSON CIRCUIT COURT
1988-CI-00812

WARREN L. PULLIAM, ET AL. MOVANTS

V.

BARNETT BANK OF TAMPA,
N/K/A BANK OF AMERICA, ET ALRESPONDENTS

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied. The opinion of the Court of Appeals is ordered not to be published.

/S/
CHIEF JUSTICE